Tulane Environmental Law Clinic

June 8, 2017

Via Email – DEQ.PUBLICNOTICES@LA.GOV
Louisiana Department of Environmental Quality, Public Participation Group
P.O. Box 4313
Baton Rouge, LA 70821-4313

Re: Noranda Alumina, LLC / Gramercy Holdings I, LLC - Part 70 Air Permit Renewal/Modification
Permit No. 2453-V6
Agency Interest No. 1388
Activity No. PER20150003

Dear Public Participation Group:

Louisiana Environmental Action Network (LEAN), Sierra Club Delta Chapter, Gulf Restoration Network (GRN), Louisiana Audubon Council, St. James Human Enterprises for Loving People (H.E.L.P.), Concerned Citizens of St. John the Baptist Parish, and Harry Joseph submit the following comments regarding the proposed Part 70 (Title V) Air Operating Permit Renewal/Modification no. 2453-V6 ("proposed permit") for the Noranda Alumina, LLC / Gramercy Holdings I, LLC alumina processing Plant (the "Plant") located in St. James, Parish between Gramercy and Mt. Airy, Louisiana.

I. The proposed permit allows Noranda to emit mercury in amounts that harm the environment and human health.

The Plant produces alumina from bauxite, an ore that contains mercury. The alumina is smelted elsewhere into aluminum. In 2014 Noranda announced that it had discovered liquid mercury in a production unit. Noranda has thus been emitting mercury, probably since production started at the Plant in 1959. Noranda's mercury quantification studies showed that mercury emissions were approximately 1,209 lbs./year at actual production levels and 1,378 lbs./year using permitted levels of operation. *See* Noranda Alumina LLC, Mercury Mass Balance at Noranda Alumina Facility, 8-9 (May 2016), EDMS No. 10215177.[1] Furthermore, Barry Kohl, Ph.D., an expert in the fields and geology and sedimentology, testifies that the Plant emits even more. *See* Affidavit of Barry Kohl, Ph.D., ¶¶ 8-9, Attachment A.

An Environmental Integrity Protect report, based on data from EPA's Toxic Release Inventory, shows that the Plant was the third highest mercury emitter in the nation in 2014 at

[1] Available at http://edms.deq.louisiana.gov/app/doc/view.aspx?doc=10215177&ob=yes&child=yes

actual production levels.[2] Within Louisiana, the largest mercury emitter in 2013 was Big Cajun II at 486.3 lbs. /year.[3] In 2013, every other emitter in the state besides Big Cajun and Noranda emitted less than 200 lbs. /year. Therefore, it is clear that at the current emission levels the Plant has been and will continue to be the dominant source of mercury in the State of Louisiana. But rather than seeking to eliminate or reduce its mercury emissions, Noranda applied for the permit at issue allowing it to emit mercury at 1,500 lbs./year.

The Plant is adjacent to wetlands that drain northwards to the Blind River. These areas are impacted by mercury that is deposited from the Plant's air emissions. A report prepared by Lindsey Sears shows the deposition rates of mercury to the surrounding environment (including the Blind River and area wetlands). *See* Affidavit of Lindsey Sears, June 8, 2017, Attachment B.[4] Furthermore, Noranda's own report shows that its mercury emissions reach the area wetlands and Blind River. *See* Air Toxic Modeling Report, June 2016, Figures 3-1, 3-2, EDMS no. 10257092.[5] And LDEQ monitoring on March 16 and 17, 2015 detected a plume of mercury in the air approximately 3 miles away from the Plant when the wind was blowing from the Plant in the direction of the monitor. It is therefore clear that mercury from the Plant has contributed and continues to contribute to the high levels of mercury in the area.

Long-term monitoring of water and sediments indicate that the Plant is a longstanding source of mercury to the wetlands adjacent to the Plant that drain into the Blind River. *See* Final TMDLs for Mercury in Selected Subsegments in the Lake Pontchartrain Basin, Louisiana (2012), Attachment C;[6] *see also* Kohl Aff., ¶ 11. According to Dr. Kohl, "the Plant, which has been operating since 1959, has contributed significant elemental mercury to the environment and has contaminated wetlands and water bodies adjacent to the Plant." Kohl Aff., ¶ 12. Dr. Kohl testifies that "[a]dditional mercury air emissions will continue to contaminate the surrounding ecosystems (e.g., the Blind River watershed)." Id at ¶ 12.

Dr. Kohl explains that "[a]ir emissions from [the Plant] will drift downwind and be deposited in wetlands and water bodies and accumulate in bottom sediments where the elemental mercury will convert to methyl-mercury by biologic processes." Kohl Aff., ¶ 11. "The methyl-mercury will become bioavailable to invertebrates and fish and it will bioaccumulate in predatory fish." *Id.* Indeed, the water and sediments in these wetlands are contaminated by mercury at levels that harm the environment and already contribute to the high levels of mercury in fish in the Blind River that humans could eat.

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[2] http://environmentalintegrity.org/wp-content/uploads/MercuryFalling_FINAL.pdf at Table 2.

[3] http://www.theadvocate.com/new_orleans/news/communities/article_63963c41-f2b7-52d6-8244-0f5cd8f86ba0.html

[4] The modeling files that support Ms. Sears' report are being submitted to LDEQ Public Participation Group electronically.

[5] Available at http://edms.deq.louisiana.gov/app/doc/view.aspx?doc=10257092&ob=yes&child=yes

[6] Available at https://www3.epa.gov/region6/water/npdes/tmdl/2012/la/final/ponch_mercury_tmdl_2012f.pdf

The State has listed the Blind River under the Clean Water Act as impaired for mercury and has assigned a Total Maximum Daily Load ("TMDL") to mercury to help reduce its concentration in the river. *See* Final TMDLs for Mercury in Selected Subsegments in the Lake Pontchartrain Basin, Louisiana (2012), Attachment C.[7] According to the TMDL report, most of the mercury present results from atmospheric deposition.[8] This Table 3-2 of the TMDL report (copied and pasted below) shows that mercury levels in the sediment in the Blind River are highest close to the Plant. Station 0156 is closest to the Plant and it has the highest amount of mercury at 0.4 mg/kg. *See* Map of Sampling Stations, Attachment D; Map of Mercury Sediment Sampling Results, Attachment E.

Table 3-2. Available inorganic mercury sediment data for the Lake Pontchartrain Basin

Subsegment	Station	Station name	Period of record	No. of obs.	Hg minimum (mg/kg)	Hg maximum (mg/kg)	Hg average (mg/kg)
040701	0033	Tangipahoa River west of Robert, LA	12/16/2002–7/26/2004	2	0.003	0.004	0.004
040403	0117	Blind River near Gramercy, LA	1/31/2000–1/11/2001	3	0.120	0.280	0.195
040403	0156	Blind River northwest of Gramercy, LA	1/9/2003–9/17/2007	3	0.063	0.424	0.184
040403	0228	Amite River at mile 6.5, at Clio, LA	1/18/2000–1/14/2008	5	0.000	0.160	0.089
040303	0230	Amite River at mile 6.5, at Clio, LA	7/14/2004	1	0.083	0.083	0.083
040401	0235	Blind River East of Sorrento, LA	1/21/2004–7/28/2008	3	0.000	0.070	0.037
040801	0409	Tchefuncte River near Covington, LA	8/30/1994–7/26/2004	5	0.000	0.098	0.057
040905	0422	Bayou Liberty west of Slidell, LA	7/23/2007	1	0.245	0.245	0.245
040905	0503	Bayou Liberty near Slidell, LA	8/24/1995–4/19/1999	3	0.030	0.820	0.297
040403	0538	Blind River near Gramercy, LA	7/24/1996–2/2/2009	3	0.000	0.520	0.327
040905	1077	Bayou Liberty at Hwy. 433 Bridge	7/24/2001–9/13/2004	3	0.047	0.151	0.096
040701	2139	Skulls Creek west of Robert, LA	3/24/2003	1	0.056	0.056	0.056
040403	2846	Petite Amie River east of Sorrento, LA	1/29/2004	1	0.116	0.116	0.116
040401	3064	Black Lake near Denson, LA	4/4/2005	1	0.114	0.114	0.114

The EPA Region 4 Superfund screening value for mercury in sediments is 0.13 mg/kg. EPA Region 5 uses an ecological screening level for mercury in sediments of 0.1 mg/kg, and some studies show certain birds are sensitive to mercury below this level. In addition, mercury is toxic to Plants at a level of 0.3 mg/kg. The mercury level in the most recent sediment sample (in 2007) at the sampling station closest Noranda was 0.4 mg/kg, or about four times the Region 5 standard. Most of the other available samples also exceed that standard. Attachment E shows the mercury levels in sediment in the Blind River close the Plant. The mercury levels in sediment in the River are highest close to Plant. This shows that the Plant is the major source of mercury to the River.

Furthermore, Mercury pollution in the Blind River has caused the State of Louisiana to advise the public to limit its consumption of fish caught in the Blind River. The State of Louisiana issued a fish consumption advisory in 1993 due to excess levels of mercury in bowfin

[7] Available at https://www3.epa.gov/region6/water/npdes/tmdl/2012/la/final/ponch_mercury_tmdl_2012f.pdf

[8] This report did not consider inputs from sources other than atmospheric deposition.

and other fish species. EPA's human health criterion for methylmercury is 0.3 mg/kg. The state considers issuing a fish advisory if the average mercury levels are 0.5 mg/kg or higher for total mercury. Results from fish tissue sampling vary widely, but the average of the samples taken in the main stem of the Blind River between 2000 and 2008, when the most recent samples were taken, is 0.68 mg/L. This is above the state standard, illustrating the need for the fish advisory and the significant risk to human health. In addition to the fish advisory on the Blind River, there are many fish advisories on other waterways within Louisiana. The quantification of the extremely high mercury emissions rate makes it plain that the Plant could be the main cause of many if not all of these advisories.

Mercury is an extremely potent human toxin that affects brain functioning and causes birth defects. *See* Stephan Bose-O'Reilly, *Mercury Exposure and Children's Health*, 40 Current Problems in Pediatric and Adolescent Health Care 8 (Sept. 2010).[9] When people consume mercury-contaminated fish they risk exposure to harmful levels of methylmercury. *Id.* Pregnant women, fetuses, and infants are particularly susceptible to harm. EPA has found that "[s]erious developmental and adult effects in humans, primarily damage to the nervous system, have been associated with exposures to mercury." 66 Fed. Reg. 22,927, 22,928 (May 7, 2001). Further, "[b]ecause the developing fetus may be the most sensitive to the effects from methylmercury, women of child-bearing age are regarded as the population of greatest interest."[10] Methylmercury has "been shown to be a developmental toxicant, causing subtle to severe neurological effects at very low levels of exposure, especially to fetuses and young children." 68 Fed. Reg. 4481, 4482 (Jan. 29, 2003).

During outbreaks of methylmercury poisonings, mothers with no symptoms of nervous system damage gave birth to infants with severe disabilities, showing that the developing fetal nervous system is more vulnerable to methylmercury than is an adult's nervous system. Stephan Bose-O'Reilly, supra. The most common way people are exposed to any form of mercury is by eating fish containing methylmercury. *Id.*

Confirming that high mercury levels in fish endanger humanheath, a study of mercury levels in the hair of recreational anglers in Louisiana showed that 40% of them were consuming more mercury levels than is considered safe and 13% had mercury levels that are high enough to cause heart attacks. Lincoln et al, *Fish Consumption and Mercury Exposure Among Louisiana Anglers*, Environ Health Perspect. 2011 Feb; 119(2): 245–251.[11] The study confirmed that the majority of this mercury came from the consumption of recreationally caught fish. *Id.*

In addition to the harm it causes humans, mercury in the environment endangers "a variety of different species." 72 Fed. Reg. 37346, 37368 (July 9, 2007). For example,

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[9] Available at http://www.sciencedirect.com/science/article/pii/S1538544210000933

[10] EPA, Mercury Study Report to Congress, EPA-452/R-97-003 vol. 1 at O-3 (Dec. 1997), Exec. Summ. at https://www.epa.gov/sites/production/files/2015-09/documents/volume1.pdf.

[11] Available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3040613/

'[c]onsumption of prey with elevated levels of mercury can cause adverse effects on growth, development, reproduction, metabolism and behavior in birds." *Id*. EPA explained in a report to Congress that "[a]dverse effects of mercury on fish, birds and mammals include death, reduced reproductive success, impaired growth and development, and behavioral abnormalities."[12]

Moreover, "[m]ethylmercury continues to accumulate in fish as they age." 66 Fed. Reg. 1344, 1348 (Jan. 8, 2001). Indeed, mercury "in its methylated form is the only metal known to biomagnify in successive levels of the aquatic food chain." 53 Fed. Reg. 41356, 41371 (Oct. 21, 1988). To "biomagnify" is to "progressively build up in successive trophic levels because it bioaccumulates in the bodies of organisms lower in the food chain." 72 Fed. Reg. 19590, 19625 (April 18, 2007). "Unlike many other elements, methylmercury does not break down over time." Maine People's All. v. HoltraChem Mfg. Co., LLC, No. 1:00-CV-00069-JAW, 2015 WL 5155573, at *21 (D. Me. Sept. 2, 2015).

EPA reports that concentrations of between 0.8 and 6 *u*g/L) (*i.e*., 0.8 and 6 parts per billion) of methylmercury can have toxic effects on fresh water aquatic plants.[13] EPA notes that "[r]eproductive impairment [in birds] has been observed in laboratory studies when mercury concentrations in eggs exceed 0.5 *u*g/g (*i.e.*, 0.5 parts per million).[14] Among "sensitive" species of mammals, death has been found to occur with methylmercury in the diet at 0.1 - 0.5 *u*g/g (0.1 - 0.5 parts per million).[15]

II. LDEQ's must conduct its public trustee analysis before making a permit decision.

LDEQ is proposing to permit emissions of mercury to the air from the Plant for the first time. As discussed above, the evidence shows that the LDEQ's proposed permit action will allow emissions of mercury to the air that will deposit into water and sediments close to the Plant and adversely impact human health and the environment. LDEQ's proposed action is an agency action that triggers its duty as public trustee to conduct the required analysis. Indeed, the Louisiana Constitution prohibits LDEQ from issuing the permit without conducting its public trustee review.

When issuing permits, LDEQ must meet both technical regulatory requirements and its duty as "public trustee" under Article 9, § 1 of the 1974 Louisiana Constitution to protect the environment "insofar as possible and consistent with the health, safety, and welfare of the people." La. Const. Art. 9, Sec. 1; *see also* La. R.S. 30:2014(A)(4) ("[LDEQ] shall consider and follow the will and intent of the Louisiana Constitution and Louisiana statutory law in making any determination relative to the granting or denying of permits."). The Supreme Court interpreted Article 9, § 1 as requiring LDEQ "to determine that adverse environmental impacts

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[12] EPA, Mercury Study Report to Congress, EPA-452/R-97-003 vol. 1 at O-3(Dec. 1997), Exec. Summ.

[13] EPA, Mercury Study Report to Congress, EPA-452/R-97-003 vol. 6, tbl. at 2-26 (Dec. 1997), https://www.epa.gov/sites/production/files/2015-09/documents/volume6.pdf.

[14] *Id*. at 2-29.

[15] *Id*. at 2-30.

have been minimized or avoided as much as possible consistently with the public welfare" "**before granting approval of proposed action affecting the environment**." *Save Ourselves, Inc. v. Louisiana Envtl. Control Comm'n* 452 So. 2d 1152, 1157 (emphasis added). To make this determination, the First Circuit mandates that LDEQ must issue a written permit decision that satisfactorily answers whether:

> (1) the potential and real adverse environmental effects of the proposed project have been avoided to the maximum extent possible; (2) a cost-benefit analysis of the environmental impact costs balanced against the social and economic benefits of the project demonstrate that the latter outweighs the former; and (3) there are no alternative projects or alternative sites or mitigating measures which would offer more protection to the environment than the proposed project without unduly curtailing non-environmental benefits to the extent applicable.

In re General Permit for Discharges from Oil & Gas Exploration, Development, & Production Facilities, 2010-1640, p. 4 (La. App. 1 Cir. 6/10/11) (emphasis added); 70 So. 3d 101, 104.

As the Supreme Court stressed, the agency's "role as the representative of the public interest does not permit it to act as an umpire passively calling balls and strikes for adversaries appearing before it; the rights of the public must receive **active and affirmative protection**." *Save Ourselves*, 452 So. 2d at 1157 (emphasis added). Indeed, as public trustee, "the LDEQ is **duty-bound** to demonstrate that it has properly exercised the discretion vested in it by making basic findings supported by evidence and ultimate findings that flow rationally from the basic findings; and it must articulate a rational connection between the facts found and the order, or in this case, the permit issued." *In re General Permit*, 2010-1640, p. 4 (La. App. 1 Cir. 6/10/11); 70 So. 3d at 104 (emphasis added). "Only by detailing its reasoning does the DEQ uphold its position as public trustee and justify the discretion with which it is entrusted by constitutional and statutory authority in a contested environmental matter." *In re: American Waste and Pollution Control Co.*, 93-3163 (La. 9/15/94); 642 So.2d 1258, 1266. Where LDEQ's decision "was reached procedurally, without individualized consideration and balancing of environmental factors conducted fairly and in good faith, it is the court's responsibility to reverse." *Save Ourselves*, 452 So. 2d at 1159.

Here, LDEQ must consider the injury and threat of injury to human health, the environment, and economic interests of the residents of the area. As discussed above, data obtained by the State show that the levels of mercury in water and sediments close to the Plant are high enough to endanger health and the environment. The data show that mercury drains towards the Blind River where it contributes to high levels of mercury in fish that may be eaten by people. The levels in the fish are high enough to cause a significant risk to the health of humans, especially children and pregnant women.

LDEQ is obligated to balance the need the Noranda to manufacture alumina without controlling mercury emissions against the benefit to the people of Louisiana to be able to use and enjoy the Blind River and surrounding waterways free of mercury impairment, and to be able to

eat fish from these waterways that are not contaminated with mercury. LDEQ must conduct a meaningful and supported cost-benefit analysis. If LDEQ gives "insufficient weight to the environmental protection in balancing the costs and benefits of the proposed action," then the decision cannot stand. *In re Rubicon, Inc.*, 670 So.2d 475, 482 (La. App. 1 Cir. 1996); *see also Matter of American Waste*, 642 So.2d at 1266 (affirming the First Circuit's decision to vacate the order granting the permit application for a solid waste disposal facility where the court could not be determine whether LDEQ "balanced the benefits of the [] proposed project against the site's inherent environmental risk"). The First Circuit has acknowledged that "[h]arm to the environment cannot always be quantified as easily as the economic benefits derived from taxes and salaries." *Matter of CECOS Intern., Inc. Livingston Facility Permit Application No. LAD00618298*, 574 So.2d 385, 392 (La. App. 1 Cir.1990). Nonetheless, "the gravity of the harm [and] contamination of our natural resources, must also be taken into consideration when balancing the benefits versus the risks." *Id.*

LDEQ proposes to issue a permit to allow Noranda to continue to emit high levels of mercury into the already impaired environment without any emission controls or mitigative measures. LDEQ is proposing to allow uncontrolled emissions of mercury to continue to impact the Blind River and contaminate fish that people eat simply because its regulations do not require it to impose emission controls. However, LDEQ is required to determine whether any reasonable mitigative measures are available that would offer "more protection for the environment than the project as proposed without unduly curtailing non-environmental benefits." *In re General Permit*, 2010-1640, p. 4 (La. App. 1 Cir. 6/10/11); 70 So. 3d at 104. The Supreme Court made clear that LDEQ's public trustee duty goes beyond mere adherence to its regulations. *Save Ourselves*, 452 So. 2d 1152, 1160 ("From our review it appears that the agency may have erred by assuming that its duty was to adhere only to its own regulations rather than to the constitutional and statutory mandates."). For example, LDEQ must consider any and all pollution control equipment or processes that would reduce or eliminate mercury emissions from the Plant. And if no pollution control equipment is available, LDEQ must consider denying the permit and require closure of the Plant. Should LDEQ allow Noranda to continue as it has to contaminate the environment and aquatic life with mercury without imposing measures to reverse or stem this harm, it will have completely abdicated its duty as public trustee. *Save Ourselves*, 452 So. 2d 1152, 1156–57 ("The Constitutional standard requires environmental protection 'insofar as possible and consistent with the health, safety, and welfare of the people.'").

III. The plant is a major source of Hazardous Air Pollutants, triggering Maximum Achievable Control Technology requirements of the Clean Air Act.

Emissions of volatile metals not included in the permit make the plant a major source of hazardous air pollutants, which also trigger MACT requirements under the Clean Air Act. *See* Affidavit of Phyllis Fox, June 7, 2017, Attachment F. In addition to excluding metals, the LDEQ's toxic air pollutant emission inventory has excluded dioxins and underestimated emissions of other hazardous air pollutants, including polynuclear aromatic hydrocarbons, which are potent carcinogens. *See id.* LDEQ must therefore deny the permit and require Noranda to provide a complete analyses of all metals and other hazardous/toxic pollutants from a

representative number of samples of the bauxite that will be processed at the facility and emitted into the air.

Furthermore, the proposed permit indicates that the plant will emit 21.663 tons per year of hazardous air pollutants. But LDEQ failed to consider hazardous air pollutants from other sources at the site that are authorized under separate Title V permits. Title V permit no. 2387-V2 authorizes 2.71 tpy of hazardous air pollutants from the Cajunite Area, where the bauxite for the Plant is received a dock on the Mississippi River and stored in bulk prior to being processed. And Title V permit no. 2481-V4 authorizes 2.18 tpy of hazardous air pollutants from the Mud Lake Management Area, which consists of impoundments for spent bauxite or red mud. These areas along with the bauxite processing area are one source and together emit more than 25 tpy of hazardous air pollutants. The plant therefore is a major source of hazardous air pollutants triggering MACT requirements under the Clean Air Act.

IV. Exemptions from state implementation plans (SIP) limits for particulate matter ("PM") violate the Clean Air Act.

The emission sources listed under General Condition XVII Activities are subject to the EPA-approved[16] SIP limit in LAC 33:III.1311.C for particulate matter, which provides:

> The emission of particulate matter from any source other than sources covered under Subsection D of this Section shall be controlled so that the shade or appearance of the emission is not denser than 20 percent average opacity (see LAC 33:III.1503.D.2, Table 4); except the emissions may have an average opacity in excess of 20 percent for not more than one six-minute period in any 60 consecutive minutes.

Because this limit is in an EPA-approved SIP, LDEQ does not have the authority to suspend or modify it. Despite this, however, the proposed permit unlawfully allows for an exemption from these limits during routine maintenance. *See* Proposed Permit, Air Permit Briefing Sheet, Section VIII; Statement of Basis, p. 6.

LDEQ air regulations provide that General Conditions XVII Activities are:

> Very small emissions to the air, resulting from routine operations, that are predictable, expected, periodic, and quantifiable and that are submitted by the permitted facility to, and approved by, the Office of Environmental Services are considered authorized discharges. Approved activities are noted in the Louisiana General Condition XVII Activities List of the permit. To be approved as an authorized discharge, such very small releases must:

[16] EPA approved Section 1311 on March 8, 1989, and incorporated it into the Louisiana State Implementation Plan ("SIP"). Approval and Promulgation of Air Quality Implementation Plans; Louisiana, 54 FR 9783-01 (Mar. 8, 1989) (codified at 40 C.F.R. § 52.970(c)(49)).

1. generally be less than 5 TPY of criteria and toxic air pollutants;
2. be less than the minimum emission rate (MER);
3. be regularly scheduled (e.g., daily, weekly, monthly, etc.); or
4. be necessary prior to plant start-up or after shutdown (line or compressor pressuring/depressuring, for example).

LAC 33:III.537, Table 1.

But LDEQ cannot use General Condition XVII to authorize emissions from sources that are subject to emission limits. Section 110 of the Clean Air Act makes clear that LDEQ cannot remove or weaken emission limits established in the SIP. Subject to exceptions that do not apply here, the provision states that "no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by [EPA]." 42 U.S.C. § 7410(i); *see also* 42 U.S.C. § 7416 ("[I]f an emission standard or limitation is in effect under an applicable implementation plan . . . , such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than [the SIP]." States may only change SIP provisions after public notice and EPA review and approval process. *See* 42 U.S.C. § 7410(l). LDEQ has not gone through that process to exempt the sources listed under General Condition XVII Activities from the emission requirements under section 1311.C. Therefore, the exemption during startups violates the Clean Air Act.

The exemptions for sources under General Conditions XVII during routine maintenance violate the Clean Air Act requirement that emission limits apply on a "continuous" basis, and thus even during startups. 42 U.S.C. § 7602(k); *see also Sierra Club v. EPA*, 551 F.3d 1019, 1027 (D.C. Cir. 2008) ("Congress has required that there must be continuous section 112–compliant standards."); *Sierra Club v. Dairyland Power Co-op.*, No. 10-CV-303-BBC, 2010 WL 4294622, at *13 (W.D. Wis. Oct. 22, 2010) ("PSD sources must apply best available control technology emission limits continuously, once PSD is triggered."); H.R. Rep. 95–294, at 92 (1977), as reprinted in 1977 U.S.C.C.A.N. 1077, 1170 ("By defining the terms 'emission limitation,' 'emission standard,' and 'standard of performance,' the committee has made clear that constant or continuous means of reducing emissions must be used to meet these requirements.").

Clean Air Act section 302(k), 42 U.S.C. 7602(k), defines the term "emission limitations" as "a requirement established by the State or Administrator which limits the quantity, rate, or concentration of emissions of air pollutants *on a continuous basis*, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this Act." (Emphasis added). A federal circuit court has confirmed this requirement in the context of a Clean Air Act hazardous air pollutant requirement. *See Sierra Club v. EPA*, 551 F.3d at 1028 (finding that the SSM exemption violates the Clean Air Act's requirement that some emission standards must apply continuously). Even accepting that "continuous" for purposes of the definition of "emission standards" under Clean Air Act section 302(k) does not mean

unchanging, the court found exemptions violate the Clean Air Act requirement that some emissions limitation standard apply at all times. *Id.* at 1021.

Here, the exemptions in the proposed permit are complete exemptions from the SIP limits in sections 1311.C. There are no alternative limits for routine maintenance. Thus, the exemptions violate Clean Air Act 302(k), 42 U.S.C. 7602(k), requirements.

Furthermore, Noranda's request that LDEQ provide a variance for the emissions from these sources under LAC 33:III.1311.G is completely unsupported and must be denied. LAC 33.III.1311.G provides:

> Where upon written application of the responsible person or persons the administrative authority finds that by reason of exceptional circumstances strict conformity with any provisions of these regulations would cause undue hardship, would be unreasonable, impractical or not feasible under the circumstances, the administrative authority may permit a variance from or consider a change in these regulations upon such conditions and with such time limitations as it may prescribe for prevention, control or abatement of air pollution in harmony with the intent of the act.

Therefore, to be considered for a variance under 1311.G, Noranda must provide an application to LDEQ that shows that "strict conformity" with emissions limitations would cause it "undue hardship, would be unreasonable, impractical, or not feasible under the circumstances." LAC 33.III.1311.G. Noranda has not done that. Nor has LDEQ made the requisite findings under Subsection G.

Furthermore, in 1978 when EPA approved the variance provision in 1311.G (then in section 19.0 of the Air Quality Regulations and codified in the Louisiana Administrative Code as LAC 14-11:19.5.2),[17] EPA explicitly stated that its approval "does not imply automatic approval of any variances which may become granted [and] [a]ny variance under Section 19.5.2 must comply with the requirements of 40 CFR 51.34 *and be approved by the EPA before it becomes a recognized revision to the State Implementation Plan (SIP)*." Emission Standards for Particulate Matter, 44 Fed. Reg. 13,479-01 (Mar. 12, 1979) (emphasis added). Here, there is no evidence that EPA has ever approved LDEQ's exemption from section 1311 SIP limits for the Noranda plant.

[17] The regulations governing emissions standards for particulate matter were originally promulgated by the Louisiana Department of Natural Resources, Air Control Commission under Regulation 19.0 of the Air Quality Regulations. Indeed, the variance requirements under former regulation 19.5.2 are the same as current 1311.G, except for reference to the appropriate permitting agency at the time and the requirement that a variance cannot constitute a nuisance, which is codified elsewhere under the general variance provision LAC 33:III.917. Former Regulation 19.0 as amended on December 20, 1979 is available on the EDMS as Doc. # 5977037, http://edms.deq.louisiana.gov/app/doc/view.aspx?doc=5977037&ob=yes&child=yes, and is incorporated herein. *See also* Attachment 2, providing a copy of Former Regulation 19.0.

Conclusion

For the foregoing reasons, LEAN urges LDEQ to deny the proposed permit.

Respectfully submitted this 8th day of June, 2017 by,

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